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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/717,693	11/20/2003	Hai H. Tricu	4002-3430/PC775.01	9321
7590 06/27/2007 Woodard, Emhardt, Moriarty, McNett & Henry LLP			EXAMINER	
Bank One Center/Tower			RAMANA, ANURADHA	
	Suite 3700 111 Monument Circle  ART UNIT PAPER NU		PAPER NUMBER	
Indianapolis, IN 46204-5137		3733		
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			06/27/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary    Examiner	•	Anningtion No.	A 12 4/ - >					
Examiner Ant Ramana  The MAILING DATE of this communication appears on the cover sheet with the correspondence address Period for Reply  A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.  In the STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.  In the STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.  In the STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER (100 to the second	•	Application No.	Applicant(s)					
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A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.  - after SIX (8) MONTHS from the mailing date of this communication. 1 Months of the property of the property of the property is specified some, the maintain station property of the property of t								
WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.  Examiner of time may be available under the provided and ref. X (6) MONTHS from the mailing date of this communication.  1 Property of time may be available under the provided of this communication.  1 Provided to make 1 to the provided of the communication of the communication of the provided will apply and will repire 1X (6) MONTHS from the mailing date of this communication.  1 Provided by the Office later than three months after the mailing date of this communication, even if timely filled, may reduce any second quarter to tem disjustment. See 37 CFR 1.704(b).  Status  1) ■ Responsive to communication(s) filled on 24 April 2007.  2a) □ This action is FINAL.  2b) ■ This action is non-final.  3) □ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11, 453 O.G. 213.  Disposition of Claims  4) ■ Claim(s)	The MAILING DATE of this communication ap Period for Reply	pears on the cover sheet with the o	correspondence address					
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# **DETAILED ACTION**

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### Election/Restrictions

Applicant's election with traverse of Species I (Figures 1-20) and group II (claims 37-67) in the response filed on April 24, 2007 is noted.

The traversal is on the grounds that the entire case can be searched without significant additional burden on the Examiner. This is not found to be persuasive because the search for patentably distinct subject matter requires different search queries. Furthermore, execution of a comprehensive search of all method and system claims in the instant application would not only constitute an undue burden on the Examiner, but consideration of the findings of such a search for patentability determination of the claims would be unduly onerous. It is also noted that a comprehensive search for the presently claimed subject matter is not solely limited to a search of the classes and subclasses in which they are classified.

Regarding Applicant's arguments on pages 2 and 3, it is noted that claim 19 is directed to a patentably distinct invention from each of claims 37 and 55. The system of claim 37 and 55 could be used in a method that does not require the expandable device to maintain an intervertebral spacing.

The arguments with respect to the election of species are not found to be persuasive since MPEP §803 explicitly refers to MPEP §806.04(a) when attempting to define what the term "serious burden" constitutes. This section of the MPEP refers to rule 37 CFR 1.141 for guidance. Rule 37 CFR 1.141 states that more than one species may be claimed provided the application also contains an allowable claim generic to all the claimed species and all the claims to the species in excess of one are written in dependent form (§1.75) or otherwise include all the limitations of the allowable generic claim. Since this is clearly not the case as evidenced by the rejections in this action, the requirement stands.

The requirement is still deemed proper and is therefore made FINAL.

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Claims 1-36, 53-54, 66 and 67 are withdrawn from further consideration since they are directed to non-elected inventions and species. This office action addresses claims 37-52 and 55-65 on the merits.

# Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 37, 41, 43-46, 48, 55, 57-60, 64 and 65 are rejected under 35 U.S.C. 102(e) as being anticipated by Foley et al. (US 2002/0026197 A1).

Foley et al. disclose a system for intervertebral disc repair including: a delivery instrument 222; an expandable element (254, 256) at a distal end thereof; and an expandable device 232a at a distal end thereof removably mountable to the expandable element (Figs. 7-8 and paras [0053]-[0061])).

Claims 37, 41-52 and 55-63 are rejected under 35 U.S.C. 102(b) as being anticipated by Sertich (US 5,800,550).

Sertich discloses a system for intervertebral disc repair including: a delivery instrument 98; an expandable element 112 at a distal end thereof; and an expandable device 32 removably mountable to the expandable element wherein the expandable device has a cavity 44 that can be packed with bone filler (Figs. 1A, 3 and 7B, cols. 5-9 and col. 10, lines 1-27).

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Claims 37-40 are rejected under 35 U.S.C. 102(e) as being anticipated Felt et al. (US 6,306,177).

Felt et al. disclose a system for intervertebral disc repair including: a delivery instrument 10, an expandable element 12 at a distal end thereof; and an expandable device 26 removably mountable to the expandable element wherein the expandable element includes a balloon with an interior configured to receive an expansion fluid (Figs. 1-4, col. 32, lines 53-67, cols. 33 and 34 and col. 35, lines 1-25).

Claims 37-41, 43, 48-49, 55, 57, 64 and 65 are rejected under 35 U.S.C. 102(e) as being anticipated Zhong et al. (US 6,635,078).

Zhong et al. disclose a system including: a delivery instrument 100 including an expandable element 108 at a distal end thereof; an expandable device 112 removably mounted to the expandable element 108 (Figs. 1-4, col. 3, lines 42-67, cols. 4-6 and col. 7, lines 1-19).

It is further noted that a claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. Ex parte Masham, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987).

# Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anu Ramana whose telephone number is (571) 272-4718. The examiner can normally be reached Monday through Friday between 8:00 am to 5:00 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached at (571) 272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

AR June 24, 2007

> ANURADHA RAMANA PRIMARY EXAMINER TECHNOLOGY CENTER 3700

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